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November 16, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265

ATLANTA
BOSTON
DALLAS
DELAWARE
HOUSTON
MUNICH
NEW YORK
SILICON VALLEY
SOUTHERN CALIFORNIA
TWIN CITIES
WASHINGTON, DC

Dear Ms. Dortch:

On October 21, 2010, Southern Communications Services, Inc. d/b/a SouthernLINC Wireless ("SouthernLINC Wireless") submitted to this docket an *ex parte* letter addressing certain issues confirming the Commission's legal authority to adopt an automatic roaming obligation for data services.[1]

Specifically, SouthernLINC Wireless described how the statutory language of Section 332 of the Communications Act, the statute's legislative history, established precedent, and the record of this proceeding clearly demonstrate that data roaming is not a private mobile radio service (PMRS), but is instead the functional equivalent of a commercial mobile radio service (CMRS) and should be regulated accordingly. SouthernLINC Wireless further explained that even if data roaming were to be considered PMRS, the Commission nevertheless has sufficient legal authority to adopt a data roaming obligation.

Because the carriers opposing Commission action on data roaming have confused the state of the law in this area, SouthernLINC Wireless hereby provides additional discussion and analysis of the Commission's authority to adopt an automatic roaming obligation for data services. As demonstrated below and throughout the record of this proceeding, the adoption of a data roaming obligation is well within the scope of the Commission's legal authority.[2] Accordingly, the Commission need not – and must not – allow unrelated issues to distract from or delay the taking of prompt action to make access to mobile data services available to all U.S. consumers.

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[1] / SouthernLINC Wireless *Ex Parte* filed Oct. 21, 2010. Unless otherwise noted, all filings referenced herein are in WT Docket No. 05-265.

[2] / While questions have been raised regarding the Commission's authority over broadband services more generally (including whether broadband services should be "reclassified"), SouthernLINC Wireless emphasizes that no such questions exist with respect to data roaming, which is a separate and distinct service that is clearly within the scope of the Commission's jurisdiction.

Determining Functional Equivalence Under Section 332(d)

AT&T and Verizon contend that data roaming is a private mobile radio service (PMRS), and thus the Commission is prohibited by Section 332(c)(2) of the Act from adopting a data roaming obligation. However, to the extent data roaming services do not meet the literal definition of "commercial mobile service" in Section 332(d)(1) of the Act, these services are nevertheless the "functional equivalent" of a commercial mobile service and thus subject to the same regulatory treatment.[3]

The Commission previously concluded that, through the "functional equivalent" provision, "Congress intended to narrow the scope of the definition for private mobile radio service"[4] – not to narrow the scope of the definition for commercial mobile service, as repeatedly mischaracterized by AT&T.[5] The Commission further concluded that it is necessary to "broadly interpret[] the definitional elements of CMRS because Congress intended this definition to ensure that the Commission regulate similar mobile services in a similar manner."[6] Accordingly, Congress included the "functional equivalent" provision in the definition of private mobile service to provide the Commission the flexibility and authority to "specify by regulation"[7] that a particular for-profit communications service – such as data roaming – is the functional equivalent of a "commercial mobile service" and therefore should be regulated as a commercial mobile service in order to avoid "disparate regulatory treatment."[8]

Significantly, Congress did not define the term "functional equivalent" anywhere in the statute, nor did Congress include in the statute any criteria, factors, or other guidance for determining whether a mobile service is the "functional equivalent" of a commercial mobile service under Section 332. Congress instead granted full discretion for making such determinations to the Commission, as the Commission

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[3] / *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1445-46 ¶ 76 (1994) ("*1994 Regulatory Treatment Order*") ("[W]e conclude that a mobile service may be classified as private *only* if it is *neither* a CMRS *nor* the functional equivalent of a CMRS.") (emphasis added).

[4] / *Id*. at 1445 ¶ 76 (emphasis added).

[5] / *See* Comments of AT&T filed June 14, 2010, at 17; Reply Comments of AT&T filed July 12, 2010, at 10 – 11.

[6] / *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1447 ¶ 79.

[7] / 47 U.S.C. § 332(d)(3) ("… the term 'private mobile service' means any mobile service … that is not a commercial mobile service or the functional equivalent of a commercial mobile service, *as specified by regulation by the Commission*.") (emphasis added).

[8] / *See* H.R. REP. NO. 103-213, at 496 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1185 ("1993 Conference Report"); *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1445-47 ¶¶ 76 – 78.

recognized in its *1994 Regulatory Treatment Order*.[9] Although the Commission has provided examples of the various factors it may consider – such as consumer demand and customer perception[10] – the Commission has also repeatedly held that it is free to consider and evaluate "any other relevant evidence or matters that the Commission may officially notice" as well.[11]

AT&T and Verizon incorrectly argue that in order for data roaming to be the functional equivalent of CMRS, data roaming must be a complete and perfect "economic substitute" for a CMRS offering.[12] This argument is based, however, on an overly rigid application of precedent developed under specific provisions of Title II of the Act, not under the separate authority and responsibilities granted the Commission under Title III in general or under Section 332 in particular. Indeed, while economic substitutability may be relevant to the functional equivalence analysis under Section 332(d), it is not the only factor the Commission may consider.[13]

The use of "economic substitutability" as a means of determining functional equivalence was developed by the Commission for the specific purpose of addressing claims arising under Section 202(a) of the Act[14] involving services that are directly subject to the provisions of Title II.[15] These cases did not address services regulated under Title III of the Act, nor did they involve decisions under Section 332 regarding whether a service is the functional equivalent of CMRS.[16] Accordingly, while these

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[9] / *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1446 ¶ 77 ("Congress intended to leave this issue [of functional equivalence] to the Commission's expertise.").

[10] / *Id*. at 1447 ¶ 80; 47 C.F.R. § 20.9(a)(14)(ii); *See also Beehive Tel. v. Bell Operating Cos.*, File No. E-94-57, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10567 ¶ 28 (1995) (discussing customer perception as an "important aspect" of the functional equivalency test).

[11] / *Brookfield Development and Colorado Cellcom*, FCC File Nos. 0001030441, 0001066599, Memorandum Opinion and Order, 19 FCC Rcd 14385, 14389 ¶ 12 ("*Brookfield Development*"); *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1447 ¶ 80.

[12] / *See, e.g.*, AT&T Reply Comments filed July 12, 2010, at 10; AT&T *Ex Parte* filed Sept. 22, 2010, at 5; Verizon Wireless Reply Comments filed July 12, 2010, at 26.

[13] / *Brookfield Development*, 19 FCC Rcd at 14389 ¶ 12; *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1447 ¶ 80.

[14] / 47 U.S.C. § 202(a) (prohibiting "unjust or unreasonable discrimination for or in connection with like communication service").

[15] / *See, e.g.*, *Ad Hoc Telecommunications Users Comm. v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982); *American Broad. Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

[16] / AT&T and Verizon rely primarily on one case – *Brookfield Development* (see note 11, *supra*) – in which the Commission was called on to determine whether the licensee's services were the functional equivalent of CMRS under Section 332(d). *See* AT&T Comments filed June 14, 2010, at 17; AT&T Reply Comments filed July 12, 2010, at 10; AT&T *Ex Parte* filed Sept. 22, 2010, at 5; Verizon Wireless Reply Comments filed July 12, 2010, at 26. While the Commission in this case

cases may be informative, they are not controlling, and any decisions concerning the application of Section 202(a) are binding on the Commission only to the extent that the service in question is a Title II service.[17]

Moreover, the term "functional equivalent" is not actually defined in the statutory language of either Section 202(a) or Section 332 – nor is it defined anywhere else in the Communications Act – thus making the meaning of this term imprecise at best. Accordingly, when interpreting or applying the term "functional equivalent" for purposes of Section 332(d), the Commission is not bound by Title II precedent. As the US Court of Appeals for the District of Columbia Circuit explained, "[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes."[18] In fact, the courts have made clear that even "[i]dentical words may have different meanings where [among other things] the conditions are different."[19]

For example, the Commission itself has acknowledged that even the term "telecommunications carrier" – which is defined in the Communications Act – is still an ambiguous term that can be defined "differently in different statutory provisions that serve distinct purposes."[20] Furthermore, just last year the D.C. Circuit upheld the Commission's decision to interpret the term "telecommunications carriers" in one manner for purposes of Section 222(b) of the Act while leaving open the possibility that the term might be interpreted differently for purposes of other provisions of the Act.[21] The court stated that because of the possibility of "different contexts dictating different interpretations – courts addressing the meaning of a term in one context

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mentioned the use of information on the target market and an evaluation of consumer demand – "among other factors" – as relevant to the question of functional equivalence, the Commission also stated "[W]e will consider the record in its totality, including 'any other relevant evidence or matters that the Commission may officially notice.'" *Brookfield Development*, 19 FCC Rcd at 14389-90, ¶¶ 12 – 13 (citing *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1447-48 ¶ 80). In the *Brookfield* case, the evidence ultimately presented by the petitioner was considered too minimal and unsubstantiated to even begin a meaningful functional equivalency analysis. *Id*.

[17] / SouthernLINC Wireless notes that if data roaming is in fact a Title II service directly bound by this precedent, then the question of functional equivalence under Section 332(d) is irrelevant.

[18] / *Abbot Labs. v. Young*, 920 F.2d 984, 987 (1990).

[19] / *Weaver v. U.S. Info Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (*quoting Atlantic Cleaners & Dyers, Inc. v. US*, 286 U.S. 427, 433 (1932).

[20] / *Bright House Networks, LCC, v . Verizon Cal., Inc.*, 23 FCC Rcd 10704, 10720 (2008) (holding that Bright House Networks and Comcast are telecommunications carriers for purposes of Section 222(b) of the Act).

[21] / *Verizon Cal., Inc. v. FCC*, 555 F.3d 270 (D.C. Circuit 2009).

commonly refrain from any declaration as to its meaning elsewhere in the same statute."[22]

Thus, while courts evaluating claims brought under Section 202(a) of the Act have used concepts such as "cross-elasticity of demand" or "economic substitutability" to determine "likeness" for purposes of Section 202(a),[23] the Commission is not constrained to considering only those same factors when evaluating the functional equivalence of services for very different purposes under Section 332(d) of the Act.

Finally, the mere fact that Congress adopted a distinct set of standards in Section 332 for evaluating whether a mobile service is CMRS – rather than simply applying the traditional definition of "common carrier service" – strongly indicates that Congress intended the Commission to look beyond traditional Title II concepts when evaluating whether a particular service is CMRS, the functional equivalent of CMRS, or PMRS.

The flexibility and discretion granted to the Commission by Congress through the statute demonstrate a recognition that wireless technologies and the wireless market are constantly evolving, and the Commission therefore must not be constrained by precedent developed for other purposes that may not be relevant to today's wireless marketplace and industry realities. In evaluating whether or to what extent data roaming is the functional equivalent of a commercial mobile service, the Commission should therefore embrace this flexibility and discretion rather than attempt to force a service that has largely developed in recent years into an outdated and increasingly ill-suited framework.

Data Roaming is the Functional Equivalent of CMRS

SouthernLINC Wireless previously demonstrated that, from the perspective of the retail consumer, mobile voice services and mobile data services are functionally equivalent.[24] As the Commission expressly found in its most recent report on mobile wireless competition, "[C]onsumers are increasingly substituting among voice, messaging, and data services, and, in particular, are willing to substitute from voice to

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[22] / *Id.* at 276.

[23] / Even in cases regarding Section 202(a), the D.C. Circuit has noted that while "cross-elasticity of demand may be a standard means for evaluating customer perception … There may be others." *Ad. Hoc*, 680 F.2d at 796, n. 13. The court further stated that it is up to the Commission to identify the "proper method for applying this critical concept, customer perception of functional equivalency." *Id*.

[24] / SouthernLINC Wireless *Ex Parte* filed October 21, 2010, at 4 – 5.

messaging or data services for an increasing portion of their communications needs."[25]

Retail consumers furthermore view voice roaming and data roaming to be functionally equivalent and expect (and demand) to have seamless connectivity for mobile data services when they travel outside their home network service areas just as they have for mobile voice services. Consumer perceptions and expectations regarding data roaming are well-illustrated by consumers' use of – and increasing dissatisfaction with – WiFi hotspots.

Verizon asserts that WiFi-enabled devices and WiFi hotspots "serve as an alternative to data roaming."[26] In SouthernLINC Wireless' experience, however, the significant shortcomings and limitations of WiFi hotspots are among the leading drivers of consumer demand for data roaming service. Assuming a consumer is able to find an accessible (and ideally free) WiFi hotspot in the first place, the consumer must either stay in place or confine his or her movements to a relatively small area in order to maintain a usable connection. WiFi hotspots are therefore no more effective as an alternative to data roaming than payphones are for voice roaming.

The substitutability of mobile voice and data services at the retail level necessarily has a direct impact on the perspective of the wireless carriers who are the consumers of data roaming at the wholesale level. Because their retail customers view these services as substitutes, carriers are compelled to obtain data roaming in order to meet customer demand, just as they must do with respect to voice roaming. Looked at another way, voice roaming and data roaming are critical wholesale inputs for enabling access to retail mobile voice and data services. When retail consumers substitute one service for the other, it compels substitution of all of the wholesale elements that go into the provision of each service, including roaming.

AT&T itself has previously described to the Commission the impact that consumer substitution of mobile voice and data services has on all aspects of the wireless market. As AT&T stated in comments filed with the Commission in 2009 on mobile wireless competition:

> [I]t is important that [the Commission] not draw artificial distinctions that do not reflect the way wireless services are purchased, sold, and used. Many consumers use their wireless

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[25] / *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, FCC 10-81 (rel. May 20, 2010) ("*Fourteenth Report*") at ¶ 8.

[26] / Verizon Wireless *Ex Parte* filed Nov. 5, 2010, at 2.

> services and devices for both voice and data – not just as part of the same plan but as part of the same communication (as when a customer elects not to leave a voicemail and sends a text instead, or sends a text or e-mail instead of making a phone call in the first place). That trend will only continue, as advances in network innovation permit consumers to email, text, browse the web, or even share live video from their location while simultaneously holding a voice conversation using the same device. *In view of these marketplace realities, it makes little sense to define and investigate "voice" and "data" as separate markets*.[27]

SouthernLINC Wireless agrees with AT&T that consumers increasingly perceive and demand voice and data as a unified service. It is therefore disingenuous for AT&T to now argue that data service cannot be subject to the same regulatory requirements as voice service based on the "artificial distinction" that one is interconnected to the public switched telephone network and the other is interconnected to the public Internet; distinctions that are totally irrelevant from the consumer's perspective and irrelevant to the Commission's determination of whether mobile data service is functionally equivalent to mobile voice service for purposes of Section 332(d).

Furthermore, as SouthernLINC Wireless has previously explained, from the perspective of the wireless carrier, data roaming is a wholesale, carrier-to-carrier transport service that, from a functional perspective, is no different from the underlying wholesale transport service used to facilitate voice roaming. Any distinctions between the transport services used to provide voice roaming and those used to provide data roaming arise solely from the use of different technologies to accomplish the same functions, and even these distinctions are already becoming irrelevant as wireless service providers transition to all-IP networks. As courts have held in the context of evaluating functional equivalency for purposes of tower siting under Section 332(c)(7)(B)(i)(I) of the Act,[28] functional equivalency relates to the *service* an entity provides, "not to the technical particularities (design, technology, or frequency) of its operations."[29]

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[27] / *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Comments of AT&T (filed Sept. 30, 2009) at 21.

[28] / 47 U.S.C. § 332(c)(7)(B)(i)(I) (stating that the regulation of the placement, construction, and modification of "personal wireless service facilities" by any State or local government "shall not unreasonably discriminate among providers of functionally equivalent services.").

[29] / *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 267, n. 13 (3rd Cir. 2002).

Moreover, to the extent the Commission might consider as part of its analysis under Section 332(d) the "economic substitutability" analysis used for cases brought under Section 202(a) of the Act, even this body of law rejects the notion that the services in question must be perfect substitutes for each other.[30] For example, in 1980, the D.C. Circuit upheld the Commission's determination that AT&T's full-time and part-time television signal transmission services (which at the time were Title II services) were functionally equivalent, even though "a full-time service user could not substitute part-time service and receive the same 'package of benefits, rights, restrictions, duties, facilities, and services .'"[31] Accordingly, even under the analytical framework of Section 202(a) – which may inform, but does not control the Commission's evaluation of functional equivalence under Section 332(d) – the Commission is not required to find that data roaming and voice roaming are perfect economic substitutes for each other.[32]

For these reasons – and as demonstrated throughout the extensive record of this docket[33] – the Commission can and should find that, to the extent roaming is a mobile service, data roaming is the functional equivalent of a commercial mobile service and thus is not a private mobile service under Section 332 of the Act.

Even if Data Roaming is Treated as PMRS, the FCC Still Has the Authority to Adopt a Data Roaming Obligation Under Title III

Even if one assumes that data roaming is PMRS, such a determination would not stand as a bar to the Commission's authority to adopt a data roaming obligation pursuant to its authority under Title III over radio communication in general and its authority under Section 332(a) over PMRS in particular.

SouthernLINC Wireless and other participants in this proceeding have previously discussed the precedent established by the Commission's orders adopting the wireless resale rule, in which the Commission exercised its Title III authority to apply the

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[30] / *See, e.g., Ad Hoc*, 680 F.2d at 797 (rejecting the argument that two services are not functionally equivalent unless they are identical); *American Broad. Cos.*, 663 F.2d at 139.

[31] / *Ad Hoc*, 680 F.2d at 797 (describing the court's earlier holding in *American Broad. Cos.*, 663 F.2d at 133).

[32] / Verizon asserts that "if voice roaming and data roaming were true economic and functional substitutes … there would be no perceived need for data roaming." Verizon Wireless *Ex Parte* filed Nov. 8, 2010, at 8. This argument is based on the incorrect proposition that functional equivalency requires a finding that the services in question are identical and/or perfect substitutes for each other. However, as the case law plainly demonstrates, not only is such a finding not required, but such a strict approach has been explicitly rejected by the D.C. Circuit. *See Ad Hoc*, 680 F.2d at 797.

[33] / *See, e.g.*, Rural Telecommunications Group *Ex Parte* filed Nov. 9, 2010, at 2 – 5; MetroPCS *Ex Parte* filed Nov. 11, 2010, at 4 – 12.

resale rule not only to Title II voice services but also to data and other non-Title II services as well.[34] The Commission, in fact, specifically affirmed the applicability of the resale rule to mobile data services, holding that it would be "imprudent to distinguish between data services and other services offered using CMRS spectrum."[35] This precedent clearly demonstrates that the Commission possesses the requisite legal authority under Title III to adopt a data roaming obligation, regardless of whether data roaming is CMRS or PMRS or whether the obligation in question mirrors certain obligations applied to common carriers.[36]

In addition, even if data roaming is considered to be PMRS, the Commission could adopt a data roaming obligation pursuant to its authority to regulate private mobile services under Section 332(a) of the Act, which states:

> In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 1 of this Act, whether such actions will –
>
> (1) promote the safety of life and property;
>
> (2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
>
> (3) encourage competition and provide services to the largest feasible number of users; or

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[34] / *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455 (1996); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Memorandum Opinion and Order and Order on Reconsideration, 14 FCC Rcd 16340, 16352-53 ¶ 27 (1999) ("*Resale Recon Order*"). For discussion of these orders, *see, e.g.*, SouthernLINC Wireless *Ex Parte* filed October 21, 2010, at 8; Comments of SouthernLINC Wireless filed Oct. 29, 2007, at 27-29; Reply Comments of Leap Wireless filed July 12, 2010, at 12-13; *See also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data* Services, WT Docket No. 05-265, Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking, FCC 10-59 (rel. April 21, 2010) at note 198 ("*Second FNPRM*").

[35] / *Resale Recon Order*, 14 FCC Rcd at 16367 ¶ 59.

[36] / In its most recent *ex parte* filing, Verizon challenges the validity of this precedent, asserting that "the question of legal authority was never addressed" in that proceeding and that the Commission's exercise of its Title III authority "was never subject to judicial review." Verizon Wireless *Ex Parte* filed Nov. 8, 2010, at 14. However, the question of legal authority was not only addressed but was also explicitly raised by the Commission in the first instance, as acknowledged by Verizon. *Id*. (quoting the *Resale Recon Order*, 14 FCC Rcd at 16353 ¶ 27). Furthermore, the validity of a final Commission order does not depend on whether the order has been subject to judicial review.

(4) increase interservice sharing opportunities between private mobile services and other services.[37]

As demonstrated throughout the extensive record of this proceeding, the adoption of a data roaming obligation is a legitimate and prudent means to manage the spectrum used for mobile data services, regardless of whether such services are viewed as PMRS or CMRS.

The record of this proceeding further demonstrates that a data roaming obligation would advance all of the criteria listed in Section 332(a). For example, data roaming promotes the safety of life and property because, as SouthernLINC Wireless has explained in this proceeding, access to mobile data services can save lives.[38] Without access to roaming for mobile data services, people caught in emergencies may be cut off from life-saving communications. Another commenter pointed out that "to the extent that first responders rely upon the services of rural wireless carriers … the availability of automatic broadband data roaming will promote the public interest by ensuring that public safety users are not denied access to compatible commercial networks."[39]

Data roaming also improves the efficiency of spectrum use, encourages competition, and provides services to the largest feasible number of users, particularly in rural and underserved areas and communities.[40] Finally, if data roaming is considered to be a private mobile service, a data roaming obligation would substantially increase the opportunities for carriers to share spectrum, infrastructure, and other resources with various commercial mobile services, whether internally on their own networks or with other carriers on a revenue-generating basis.

In addition, Section 332(a) explicitly states that the Commission's management of the spectrum used for private mobile services must be consistent with Section 1 of the

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[37] / 47 U.S.C. § 332(a).

[38] / *See, e.g.*, Comments of SouthernLINC Wireless filed June 14, 2010, at 7 – 8 (*citing* Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission*, June 12, 2006, at 31).

[39] / Comments of the Blooston Rural Carriers filed June 14, 2010, at 7; *See also* Comments of MetroPCS filed June 14, 2010, at 41; Comments of Rural Cellular Association at 11.

[40] / *See, e.g.*, Comments of SouthernLINC Wireless filed June 14, 2010, at 31 – 38; Comments of T-Mobile filed June 14, 2010, at 7 – 10; Comments of Leap Wireless filed June 14, 2010, at 3 – 9; Comments of the Rural Cellular Association filed June 14, 2010, at 7 – 14; Reply Comments of the Rural Cellular Association filed July 12, 2010, at 9 – 11; Comments of MetroPCS filed June 14, 2010, at 39 – 49; Comments of the Rural Telecommunications Group filed June 14, 2010, at 9 – 13; Comments of Cincinnati Bell Wireless filed June 14, 2010, at 1 – 8; Comments of Bright House Networks filed June 14, 2010, at 7 – 10.

Act. The Commission's statutory responsibilities under Section 332(a) thus incorporate the purposes of Section 1 – namely:

> … to make available, so far as possible, to all people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges …[41]

Because Section 332(a) explicitly incorporates Section 1 of the Act, the Commission may exercise its authority under Section 332(a) to adopt a data roaming obligation that satisfies the mandates of Section 1, including the mandate to make radio communication service available "at reasonable charges." Accordingly, any requirement that data roaming be provided upon request to any technologically compatible carrier at reasonable rates and on reasonable and not unreasonably discriminatory terms and conditions would not be a "common carrier obligation." Rather, such a requirement would be nothing more than a legitimate and prudent means of managing the spectrum made available for PMRS in a manner that is "consistent with section 1" of the Communications Act, as required under Section 332(a).

The FCC Also Has Authority to Adopt a Data Roaming Obligation Under Title I

In its most recent *ex parte* filing, Verizon again asserts that the Commission lacks the authority to adopt a data roaming obligation through the exercise of its ancillary jurisdiction under Title I of the Act.[42] However, Verizon's argument fails for several reasons.

First, Verizon argues that a data roaming obligation is not "necessary to carry out" any express delegations of regulatory authority under the Act.[43] Specifically, Verizon asserts that certain provisions of Title III that have been referred to in this proceeding are either irrelevant to licenses that have already been issued (Section 309(j)) or are "statements of policy" rather than delegations of regulatory authority (Section 303(g)) and are therefore insufficient to establish a basis for the Commission's exercise of ancillary jurisdiction.

Verizon conveniently omits, however, any mention of the authority expressly granted to the Commission under Section 316, which authorizes the Commission to adopt new conditions on existing licenses if it determines that such action "will promote the

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[41] / 47 U.S.C. § 151 (emphasis added).

[42] / Verizon Wireless *Ex Parte* filed Nov. 8, 2010, at 15 – 17.

[43] / *Id*. at 15 – 16.

public interest, convenience, and necessity."[44] The exercise of the Commission's authority under Section 316 does not require an individual examination and modification of each individual license. Rather, as the Commission itself noted in the *Second FNPRM*, courts have held that the Commission may exercise its Section 316 authority to modify license conditions for an entire license class through a rulemaking proceeding.[45] Section 316 thus clearly and expressly authorizes the Commission to adopt a data roaming obligation as a condition on existing licenses if doing so is found to be in the public interest.

Verizon also ignores the fact that, in addition to the express delegations of authority set forth in Title III, the Commission's exercise of Title I authority to adopt a data roaming obligation would be reasonably ancillary to the Commission's statutory responsibilities under Sections 201 and 202 of the Act.

As SouthernLINC Wireless explained in its comments, [46] mobile data services are generally provided by the same service providers over the same handsets (predominantly on a bundled basis) as mobile voice telephony services.[47] Therefore, unreasonably high wholesale data roaming rates or the denial of access to data roaming services would act to increase the cost of and/or place additional burdens on CMRS carriers in their provision of Title II voice services to consumers.[48] The absence of data roaming furthermore discriminates against consumers with few service provider options, such as those in rural areas, by denying them access to bundled voice and data plans that would enable them to access these services through a single handset when traveling outside their home territory. Accordingly, the adoption of a data roaming obligation would be reasonably ancillary to the Commission's performance of its statutory responsibilities under Sections 201 and 202 of the Act.[49]

Verizon also asserts, yet again, that data roaming is an "information service," not a "telecommunications service," and the Commission is therefore barred by Section 153(44) of the Act from exercising its ancillary jurisdiction to adopt a data roaming

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[44] / 47 U.S.C. § 316.

[45] / *Second FNPRM* at ¶ 66 (citing *WBEN, Inc. v. United States*, 396 F.2d 601 (2d Cir. 1968)).

[46] / Comments of SouthernLINC Wireless filed June 14, 2010, at 24 – 27.

[47] / *See Fourteenth Report* at ¶ 22.

[48] / *See also* Comments of Cincinnati Bell Wireless filed June 14, 2010, at 2 ("Thus, the inability to access data roaming has a backward ripple effect onto the voice wireless market as well.").

[49] / The scenario described above is not hypothetical. As SouthernLINC Wireless has previously described, a real-world example of the direct impact that a lack of data roaming can have on the provision of Title II voice services can be found in the record of this very docket. *See* Comments of SouthernLINC Wireless filed June 14, 2010, at 25 – 26.

obligation.[50] Verizon also asserts that data roaming is PMRS, and thus the exercise of Title I ancillary jurisdiction is likewise prohibited by Section 332.[51]

As an initial matter, for the reasons described above and in SouthernLINC Wireless' previous filings, data roaming is the functional equivalent of CMRS and is therefore subject to the same regulatory treatment as CMRS, thus rendering any prohibition in Section 332 against the exercise of ancillary authority irrelevant. Moreover, as SouthernLINC Wireless has previously explained in this proceeding, data roaming is a carrier-to-carrier transmission service that is more properly viewed as a telecommunications service, not as an "information service."[52]

In any event, Verizon again ignores or simply refuses to address substantial Commission precedent clearly establishing the Commission's authority under its Title I ancillary jurisdiction to impose certain, discrete Title II regulatory obligations on providers of services that have not formally been classified as Title II telecommunications service. As Verizon is well aware, the Commission has consistently exercised its Title I authority to impose certain Title II regulatory obligations on interconnected VoIP services and service providers – including obligations regarding Enhanced 911 services,[53] universal service contributions,[54] customer proprietary network information (CPNI),[55] and disability access and TRS[56]

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[50] / As SouthernLINC Wireless discusses below, Section 153(44) also does not prohibit the Commission from taking action on data roaming under other provisions of the Act as well.

[51] / *See* Verizon *Ex Parte* at 16 – 17.

[52] / Although not addressed in this particular submission, SouthernLINC Wireless has consistently stated throughout this proceeding that data roaming is a wholesale carrier-to-carrier transmission service – *i.e.*, a telecommunications service – that is subject to regulation under Title II of the Act. *See, e.g.*, Comments of SouthernLINC Wireless filed June 14, 2010 at 18 – 22; Comments of SouthernLINC Wireless filed Oct. 29, 2007, at 32 – 43; Reply Comments of SouthernLINC Wireless filed Nov. 28, 2007, at 14 – 17 and 21 – 22.

[53] / *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005), *aff'd sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006).

[54] / *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237, NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), *aff'd in relevant part, Vonage Holdings Corp. v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

[55] / *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115; WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007).

[56] / *See VoIP Disabilities Access Order*, 22 FCC Rcd at 11286-89 ¶¶ 21 – 24.

– even though no determination has yet been made as to the appropriate classification of these services under the Act.[57]

Section 153(44) Does Not Prohibit a Data Roaming Rule

Finally, Verizon argues that, regardless of the legal basis cited to by the Commission, Section 153(44) of the Act – which states that "[a] telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services" – independently prohibits the adoption of a data roaming rule.[58] Verizon asserts that data roaming is not a "telecommunications service" because (i) it is an "information service;" and (ii) it is offered on an individualized basis and is not common carriage.[59]

At the outset, as discussed above, data roaming is a carrier-to-carrier transmission service that is more properly viewed as a telecommunications service rather than as an information service.[60]

Nevertheless, as the Commission correctly noted in the *Second FNPRM*,[61] the regulatory classification of a given service as a "telecommunications service" or an "information service" is irrelevant under Title III in general or under Section 332 in particular. As Verizon itself acknowledges, Section 332(d) states that a service is CMRS if the service is (i) provided for profit; (ii) interconnected; and (iii) made available to the public or to such classes of users as to be effectively available to a substantial portion of the public, or if the service is the functional equivalent of CMRS.[62] If a service meets these criteria, it is CMRS, regardless of whether it may otherwise be considered a "telecommunications service" or an "information service."

If a service is CMRS (or the functional equivalent of CMRS), it is subject to Section 332(c)(1)(A) of the Act, which states that "[a] person engaged in the provision of a service that is a commercial mobile service *shall*, insofar as such person is so

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[57] / The Commission's imposition of certain Title II obligations on interconnected VoIP services has been consistently upheld by the D.C. Circuit. *See Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); *Vonage Holdings Corp. v. FCC*, 2007 WL 1574611 (D.C. Cir. June 1, 2007).

[58] / Verizon Wireless *Ex Parte* filed Nov. 8, 2010, at 10 (citing 47 U.S.C. § 153(44)).

[59] / *Id*.

[60] / *See, e.g.*, Comments of SouthernLINC Wireless filed June 14, 2010 at 18 – 22; Comments of SouthernLINC Wireless filed Oct. 29, 2007, at 32 – 43.

[61] / *Second FNPRM* at ¶ 66; *See also* Comments of SouthernLINC Wireless filed June 14, 2010, at 12 – 13.

[62] / 47 U.S.C. §§ 332(d)(1) and (3).

engaged, *be treated as a common carrier for purposes of this Act*."[63] While Congress granted the Commission the authority to forbear from applying certain provisions of Title II to CMRS providers, Congress expressly prohibited the Commission from exempting CMRS from the provisions of Sections 201 and 202, thus mandating that CMRS be provided upon reasonable request at just and reasonable rates and on a not unreasonably discriminatory basis.[64]

Tellingly, Congress declined to differentiate between "telecommunications services" and "information services" in requiring common carrier treatment of CMRS pursuant to Section 332(c)(1)(A), thus rendering this distinction irrelevant for the purposes of regulating CMRS.

Because the clear, specific statutory language of Section 332(c)(1)(A) supersedes the broader language of general applicability in Section 153(44) under the traditional canons of statutory interpretation, Section 153(44) does not prohibit the Commission from exercising its authority under Section 332 to adopt a data roaming obligation.

Verizon's argument that it only offers data roaming on an individualized basis and not on a "common carriage" basis is likewise irrelevant to the regulation of CMRS. In the *1994 Regulatory Treatment Order*, the Commission stated that one of Congress' principal objectives in amending Section 332 was to ensure that "similar services are accorded similar regulatory treatment."[65] In deciding how to best ensure similar regulatory treatment for similar services when determining whether a service is "made available to the public" for purposes of Section 332, the Commission stated:

> In the case of individualized or customized service offerings made by CMRS providers to individual customers, it is our intent to classify and regulate such offerings as CMRS, regardless of whether such offerings would be treated as common carriage under existing case law, if the service falls within the definition of CMRS.[66]

Accordingly, for purposes of CMRS regulation, the fact that Verizon currently offers data roaming on an individualized basis and not what it considers to be a "common carriage" basis does not affect the Commission's authority to adopt a data roaming obligation pursuant to Section 332.

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[63] / 47 U.S.C. § 332(c)(1)(A) (emphasis added).

[64] / *Id*.; 47 U.S.C. §§ 201 and 202.

[65] / *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1418 ¶ 13.

[66] / *1994 Regulatory Treatment Order*, 9 FCC Rcd at 1439 n. 130.

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For the reasons set forth above, SouthernLINC Wireless submits that the Commission possesses ample legal authority to take action on automatic roaming for data services and respectfully urges the Commission to adopt a data roaming obligation that will make access to mobile data services available to all consumers throughout the country, regardless of where they may work, live, or travel.

If you should have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

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